EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 90-1982

FILED
JUN 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

MARY JONES, Mother and Guardian on Behalf of KAREN JONES, an Incompetent, and MARY JONES,
Petitioners,

vs.

DAYTON BOARD OF EDUCATION, MIAMI LIBERTY CAB CO. and EDDIE SLAUGHTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

NWABUEZE V. OKOCHA
Counsel of Record
Okocha & Associates Co., L.P.A.
409 Investment Building
601 Rockwell Avenue
Cleveland, Ohio 44114-1602
(216) 574-9400
Counsel for Petitioners

Of Counsel:
ALVARENE N. OWENS
Alvarene N. Owens Co., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether states may condition access to their courts in actions brought under 42 U.S.C. §1983 by burdening and imposing obstacles for plaintiffs which otherwise did not apply in federal courts?

2. Did a Local School District who takes custody of a schoolchild and places her in a position of danger such that she was sexually abused by the agents of the School District contracted to transport her to school enough to trigger the protection of the Due Process Clause for purposes of §1983 liability?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTIONAL STATEMENT 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

Facts 7

REASONS FOR GRANTING REVIEW 13

I. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.. 13

II. THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT'S OPINION IS IN CONFLICT WITH THE OPINION OF OTHER CIRCUIT COURTS... 15

III. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY CREATED ACTIONS, INCLUDING §1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIES 16

CONCLUSION..... 21

APPENDIX:

Order of the Supreme Court of Ohio Overruling Motion to Certify (March 27, 1991) A1

Opinion of the Court of Appeals of Montgomery County, Ohio (October 3, 1990) A2

Decision and Entry of the Court of Common Pleas of Montgomery County, Ohio *Re* Protective Order and Motion to Quash (January 12, 1989). A15

Decision and Entry of the Court of Common Pleas of Montgomery County, Ohio Sustaining Motion to Amend Complaint (January 12, 1989) A18

Decision and Partial Summary Judgment Entry of the Court of Common Pleas of Montgomery County, Ohio (November 8, 1989) A20

Entry of the Court of Common Pleas of Montgomery County, Ohio (March 16, 1989).... A26

Second Amended Complaint and Demand for Jury Trial Edited by the Court of Common Pleas..... A28

Plaintiff's First Amended Complaint and Demand for Jury Trial A38

TABLE OF AUTHORITIES

Cases

Brown v. Western Railway of Alabama, 338 U.S. 249 (1949) 17,18

Cornelius v. Town of HIghland Lake, Ala., 880 F.2d 348 (11th Cir. 1989) 15

City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) 14

DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989) 13,14

Felder v. Casey, 487 U.S. 131 (1988) 16

Goldberg v. Kelly, 897 U.S. 254 (1970) 20

Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444 (1989) 17

Gross v. Lopez, 410 U.S. 565, 573 (1975) 20

Howlett by and through Howlett v. Rose, 110 S. Ct. 2430 (1990) 17

J.O. v. Alton Community Unit School District II, 900 F.2d 267 (7th Cir. 1990) 15

Jett v. Dallas Independent School District, 109 S. Ct. 2702 (1989) 17

Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989) 15

Maine v. Thiboutot, 448 U.S. 1 (1980) 19

Martinez v. California, 444 U.S. 277 (1980) 18

McHenry v. Chadwick, 806 F.2d 184 (6th Cir. 1990) 15

Nishiyama v. Dickson County, Tenn., 814 F.2d 277 (6th Cir. 1987) 15

Plyler v. Doe, 457 U.S. 202, 216 (1982) 14

Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989), *cert. denied*, 10 S. Ct. 840 (1990) 15

Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988) 15

West v. Atkins, 487 U.S. 42 (1988) 20

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) 15

Zinermon v. Burch, 110 S. Ct. 975 (1990) 17

Constitution and Statutes

U.S. Const., Amend. XIV 4,5,14

20 U.S.C. §§1400 *et seq.* 7

42 U.S.C. §1983 (1982) ..... *passim*

42 U.S.C. §1988 (1976) 18

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

MARY JONES, Mother and Guardian on Behalf
of KAREN JONES, an Incompetent,
and MARY JONES,
Petitioners,

vs.

DAYTON BOARD OF EDUCATION, MIAMI LIBERTY
CAB CO. and EDDIE SLAUGHTER,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Petitioners Mary Jones and Karen Jones respectfully urge a writ of certiorari issue to review judgment and opinion of the Ohio Court of Appeals for the Second Appellate District, rendered October 3, 1990.

OPINIONS BELOW

On March 26, 1989, the Court of Common Pleas, Montgomery County, Ohio, *sua sponte* edited Petitioners' complaint, removing allegations in support of Petitioners' claim for relief under §1983. A copy of the order is appended at Appendix A26-A27 and is unpublished. Petitioners complied with the court orders with reservation of rights.

On November 8, 1989, the Court of Common Pleas entered summary judgment in favor of Respondent Dayton Board of Education on the basis of sovereign immunity. A copy of the order is appended at Appendix A20-A25 and is unpublished.

The judgment sought to be reviewed is final and dated October 3, 1990. A copy is appended at Appendix A2 and also unpublished. No petition for relieving was filed.

The Supreme Court of Ohio denied discretionary review on March 27, 1991. A copy of its order is appended at Appendix A1. No petition for relieving was permitted.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review by certiorari is conferred by 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . nor deny any person with its jurisdiction the equal protection of the laws."

This case involves 42 U.S.C. §1983 (1982), which provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This action was filed in the Montgomery Court of Common Pleas, Ohio, by Petitioners Mary Jones, mother and guardian of Karen Jones and Mary Jones against the Respondents Dayton Board of Education (hereinafter referred to as "DBOE"), Miami Liberty Cab Company (hereinafter referred to as "MLCC") and Eddie Slaughter on October 22, 1987. At the heart of this suit is that on November 16, 1986, MLCC dispatched Slaughter to transport Karen Jones. Significantly, Karen Jones is a profoundly retarded, blind and multi-handicapped student of the Dayton Public School System. While Karen Jones was under the custody, control and supervision of DBOE, Slaughter in MLCC's cab, sexually assaulted Karen Jones. As a result of the sexual assault, Karen Jones became pregnant and gave birth to Sally Jones on August 9, 1987.

On December 22, 1988, Petitioners moved to amend their Complaint seeking redress for violations of their civil and constitutional rights under the Fourteenth Amendment to the United States Constitution. Attached to the motion was the proposed First Amended Complaint containing six claims: violation of civil and constitutional rights pursuant to 42 U.S.C. §1983; assault; breach of duty to protect; invasion of privacy; and loss of society and companionship. On January 12, 1989, the court granted the motion, and on January 13, 1989, the First Amended Complaint was filed.

The First Amended Complaint alleged that the DBOE placed Karen Jones in the cab and forgot her. As a result, Petitioner Karen Jones, was sexually assaulted by Eddie Slaughter, a taxicab driver of MLCC while transporting Karen Jones to Ohio State School for the Blind ("OSSB"), in Columbus, Ohio. It is this pernicious

practice, custom and policy, prior and subsequent to the sexual assault by Slaughter, of reckless or deliberate indifference to or gross negligence by the DBOE and MLCC that precipitated the deprivation of Petitioner's constitutional rights to be free from sexual abuse as well as severe mental anguish, embarrassment, humiliation and emotional distress.

On January 25, 1989, Petitioners filed another motion to amend their First Amended Complaint to add additional party plaintiff, Sally Jones. On January 31, 1989, the court denied the motion to amend. On February 1, 1989, Petitioners requested reconsideration of the court's decision. On February 3, 1989, the court reversed its decision, redrafting the Second Amended Complaint and excising all the claims or causes of action, stating that claims or causes of actions should be developed by motions or at trial. Because the proposed Second Amended Complaint was identical to the First Amended Complaint previously filed and the pleading met the specificity and particularity requirements of federal practice in a §1983 litigation, the trial court claimed it was "replete with superfluous and unnecessary allegations, conclusions of law and ... verbose." Petitioners then filed the Second Amended Complaint with reservation of rights consistent with the mandate of the court.

On November 8, 1989, the trial court awarded the DBOE's Motion for Summary Judgment, dismissing the Second Amended Complaint as to the DBOE and concluding that: "Section 1983 does not provide for violation of duties of care arising out of tort law; and the DBOE was immune from liability pursuant to Ohio Revised Code Chapter 2744, with prejudice and that

there was no just reason for delay in entering this judgment and denying Petitioners Motion for Partial Summary Judgment.

Petitioners appealed to the Court of Appeals of Montgomery County, Ohio. Said court affirmed the trial court's dismissal of the DBOE. The Court of Appeals indicated that "the trial court's action had a significant effect upon the case of Plaintiffs-Appellants" Pet. App. A9, yet, concluded that the trial court did not abuse its discretion in redrafting and excising Petitioners' 42 U.S.C. §1983 claim.

This petition asks this Court to review the Court of Appeals' judgment reversing and remanding the trial court's order granting the DBOE's motion for summary judgment on the grounds of immunity, stemming from the fact that no immunity exists for the DBOE in the instant case.

Facts

The facts in the instant case are uncontroverted. Karen Jones is a profoundly retarded, blind and behaviorally disturbed student of Dayton City School District. DBOE is responsible for the governance of the Dayton City School District. Because of Karen Jones' handicap, she was specially educated under the Education of All Handicapped Act (hereinafter "EHA"), 20 U.S.C. §§1400 *et seq.* and state law consistent with the DBOE's statutory responsibility. Since Karen Jones is entitled to instruction from the Dayton City School District, DBOE contacted the Ohio State School for the Blind, Columbus, Ohio ("OSSB"), for placement of Karen Jones. Subsequently, DBOE entered into an agreement with the OSSB to an Individualized Educational Plan ("I.E.P.") for Karen Jones as mandated by federal and

state law. Under this program, DBOE had custody of Karen Jones and was obligated to transporting her from Dayton to Columbus and back.

From 1982 to December 1986, Mrs. Jones expressed serious concerns about the safety and security of her daughter, Karen Jones. According to the September 21, 1982 Staff Notes on Karen Jones:

> Dayton City does pay the bus fare for one other OSSB student and a chaperone to and from Dayton. To this date, Mrs. Jones has not been reimbursed for a chaperone for Karen. This year, Mrs. Jones does not have a chaperone to accompany Karen to and from Dayton.

In addition, Mrs. Jones was assured by Dennis Holmes, Superintendent, DBOE, of the protection and safety of Karen Jones. Despite the fact that the DBOE knew as far back as 1982 to provide for the safety of Karen Jones, a blind and multi-handicapped child, it failed to do so even after repeated demands from the OSSB. Indeed, OSSB discovered this outrage and advised DBOE to provide an aide or chaperone to accompany Karen Jones to Columbus, but DBOE failed to provide the aide or chaperone until after Karen Jones was sexually molested.

DBOE contracted with MLCC, a common carrier to transport its students, including but not limited to blind, deaf and retarded students, such as Karen Jones to schools. Significantly, there is no written agreement in effect in violation of state law. Thereafter, MLCC hired Slaughter as one of its taxicab drivers. Although Slaughter had no contract with either DBOE or OSSB, Slaughter was furnished by MLCC and transported Karen Jones in one of MLCC's cabs at the direction of DBOE. However, the DBOE directed the seating arrangement in the cab for Karen Jones from Dayton to

Columbus and vice-versa. MLCC hired Slaughter even though Slaughter was a known felon, alcoholic and substance abuser. Also, Slaughter had had his driver's license revoked. Consequently, such a driving and criminal record made Slaughter unfit to transport schoolchildren under Ohio law.

Moreover, the agreement between MLCC and Slaughter expressly provides in pertinent part:

> 4. *That [MLCC] will assume all responsibility for all damages to persons* or property resulting from the carelessness and negligence of Lessee while operating said automobile as a taxicab in conformance with this Agreement. (Emphasis added).

This indemnity provision expressly provides that MLCC is responsible for Slaughter's actions.

On November 16, 1986, MLCC dispatched Slaughter to transport Karen Jones to OSSB, Columbus, consistent with its arrangement with the Board. Along with Karen Jones, were two deaf and mute children. After dropping off the two deaf and mute children, Slaughter imposed himself on Karen Jones and engaged in sexual intercourse with her in the back seat of the cab. In order to cover-up the sexual assault perpetrated on Karen Jones, Slaughter bribed Karen Jones with a McDonald's hamburger so that Karen Jones would not disclose the incident. Subsequently, Slaughter pleaded guilty to sexual battery in the Franklin County Court of Common Pleas. Thereafter, Slaughter was incarcerated.

Before November 16, 1986, Slaughter had never seen Karen Jones or been to her home. In addition, all conversations between Karen Jones and Slaughter took place in MLCC's cab. Moreover, Slaughter had never

been to OSSB before he engaged in sexual intercourse with Karen Jones in a driveway of a supposed church building. In a like manner, DBOE directed that Karen Jones sit on the front seat by the cab driver. Thus, both DBOE and MLCC provided Slaughter with opportunity and the instrumentality to perpetrate the sexual assault. As a result of the sexual intercourse with Slaughter, Karen Jones conceived and became pregnant. On August 9, 1987, Petitioner Karen Jones gave birth to a baby girl, Sally Jones. A genetic testing administered on July 12, 1989, clearly shows that Slaughter is the natural and biological father of Sally Jones. The Juvenile Division of the Montgomery Court of Common Pleas declared that Slaughter is the father of Sally Jones.

Significantly, Karen Jones, though eighteen at the time of the incident, had a reading level at a second grade level. Although DBOE and MLCC knew the peculiar susceptibilities of Karen Jones, they breached their duty towards her by placing her in danger and increased her risk of harm, and failed to protect her from sexual abuse while under their custody, control and supervision. The duty of DBOE, MLCC and Slaughter to protect Karen Jones was even greater here because this child was blind and mentally retarded and in their custody, when she was sexually assaulted. When questioned concerning the benefits of the pregnancy on Karen Jones's I.E.P. goals, Dr. Elizabeth Hagton testifying on behalf of DBOE stated that "[e]ducationally I could never write a goal that would include pregnancy as an outcome." Also, Slaughter testified that if he did not do it some other cab driver would. The pregnancy completely devastated Karen Jones and disrupted her education. Presently, Karen Jones continues to suffer from the trauma of this violent act. Karen Jones has been severely and permanently

injured in that she conceived and bore a child, for which provision for care must be had and Karen Jones as an incompetent is unable to provide for Sally Jones's child care, necessities, medical, educational and recreational expenses until Sally Jones reaches majority. Furthermore, the trauma and anxiety is indelible.

In spite of Slaughter's sexual assault of Karen Jones, MLCC failed to discipline Slaughter even after investigating the incident and receiving directives from DBOE. Rather, MLCC ratified and condoned Slaughter's action in accordance with its agreement with Slaughter. Subsequently, the City of Dayton suspended Slaughter's license.

MLCC and DBOE knew that handicapped children under their custody, control and supervision needed greater care and protection from abuse by third parties. This incident of sexual abuse of a handicapped child by an ex-felon was clearly avoidable. Nevertheless, DBOE failed to take steps to protect the children under its custody and supervision.

On November 16, 1987, Petitioners filed this action in the Montgomery County Court of Common Pleas. Petitioners amended the complaint bringing additional claims for violation of Petitioners civil and constitutional rights pursuant to 42 U.S.C. §1983; assault, invasion of privacy, gross negligence, intentional infliction of emotional distress and loss of consortium or services. Later, Petitioner, sought to add Sally Jones, the trial court then, rewrote the complaint to somewhat of a general pleading. On March 28, 1989, the Petitioners filed the second amended complaint in accordance with the trial court's order.

In August 1989, Petitioners and Respondent DBOE filed Motions for Summary Judgment. Also, on September 8, 1989, Respondent MLCC filed its Motion for Summary Judgment. On September 15, 1989, Petitioners amended their Motion for Partial Summary Judgment.

On November 8, 1989, the trial court granted the DBOE's Motion for Summary Judgment. The court held that the DBOE was immune from liability pursuant to Ohio sovereign immunity statute and found no Section 1983 violation. Further, the trial court dismissed the Second Amended Complaint as to DBOE, with prejudice and that there was no just reason for delay in entering this judgment.

On December 4, 1989, the Petitioners timely filed their Notice of Appeal. The Court of Appeals for Second Appellate District affirmed, stating that the trial court properly excised Petitioners' Section 1983 claims. Although the court recognized an equal protection basis for Petitioners' claim, it upheld judgment, noting that the trial court's action had significantly deprived Peitioners of their Section 1983 claim.

REASONS FOR GRANTING REVIEW

I. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.

Petitioners urge that the decision of the Ohio Court of Appeals for the Second Appellate District is contrary to prior opinion of this Court, and this Court should grant certiorari to correct this contradiction.

Comparing the facts of the instant case to those of *DeShaney v. Winnebago County Department of Social Services,* 109 S. Ct. 998 (1989), the court will find the significance of this question and the appropriateness of its determination in this case. Under *DeShaney*, it is not clear how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect, it is clear that at some point such actions create a duty. *DeShaney*, 109 S. Ct. 1005. This Court has found such a situation only in a custodial setting. This is the situation in this case.

In *DeShaney, supra,* the court considered it necessary to review the state's actions with regard to Joshua's claim to determine whether the state had placed him in greater danger or made him more vulnerable, even though he was in a non-custodial setting. *Id.* at 1006. Although the *DeShaney, supra,* decision held that a state had no constitutional duty to protect a child, Joshua, from attacks by his father even though the state had received reports of the father physically abusing the child, 109 S. Ct. at 1001, it nonetheless, establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of or vulnerability to such

violence beyond the level it would have been at absent state action's.

The present case obviously raises the question which this court noted to be still in need of resolution in *DeShaney*. Unlike *DeShaney*, the Petitioners submit that Respondents adopted and implemented policies deliberately indifferent to Karen's constitutional rights; they were charged to protect her since the DBOE took custody of her. Respondents had established a special relationship with Karen, and that the DBOE played an active role in the creation of the danger to Karen; and finally, that the DBOE's practices violated the Equal Protection Clause.

As the court noted in *DeShaney*, the state may not "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 1004 n.3. The Equal Protection Clause of this Court has repeatedly ruled that the Equal Protection Clause mandates requires a state to treat all similarly situated persons alike. *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Ohio Court of Appeals in the present case admits that an Equal Protection Clause claim may apply for the DBOE different treatment of a similarly situated student under its custody. Since DBOE provided an aide or chaperone for another white handicapped student in the OSSB, and refused to do so with respect to Karen, in spite of repeated demands and promises, it violates Karen's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Given this Court's rulings, the *Jones* opinion is definitely contrary to previous United States Supreme Court rulings. Therefore, Petitioners urge that the decisions of the Ohio Court of Appeals for the Second Appellate District, *vis-a-vis* the facts of the instant case, is contrary to Supreme Court precedent.

II. THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT'S OPINION IS IN CONFLICT WITH THE OPINION OF OTHER CIRCUIT COURTS.

The Court should grant the instant petition because the *Jones* case is contrary to the opinions of other circuit courts. The Third Circuit has ruled that a school district could be liable for its policies of deliberate indifference toward alleged abuse by one of its teachers. *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989), *cert. denied,* 110 S. Ct. 840 (1990). The facts of the instant case are quite analogous to those of *Stoneking.*

The Seventh Circuit has ruled in the case of *J.O. v. Alton Community Unit School District II,* 909 F.2d 267 (7th Cir. 1990) that School authorities did not have affirmative duty under due process clause to prevent alleged sexual abuse by teacher, such that breach of that duty gave use to cognizable liberty interest claim.

Additionally, the Sixth, Ninth, Tenth and Eleventh circuits have established a person's right to be free from being placed in dangerous situations by government officials or agents. *See Leach v. Shelby County Sheriff,* 891 F.2d 1241 (6th Cir. 1989); *McHenry v. Chadwick,* 896 F.2d 184 (6th Cir. 1990); *Nishiyama v. Dickson County, Tenn.,* 814 F.2d 277 (6th Cir. 1987); *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989); *Watson v. City of Kansas City, Kansas,* 857 F.2d 690 (10th Cir. 1988); *Cornelius v. Town of Highland Lake, Ala.,* 880 F.2d 348 (11th Cir. 1989).

Because of the inconsistence among the Third, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits, the Supreme Court should grant Certiorari and settle the apparent conflict of authority.

III. THE DECISION OF THE OHIO COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT CONFLICTS WITH DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY CREATED ACTIONS, INCLUDING §1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIES.

This Court has expressly reserved the issue of whether state courts are obligated to entertain §1983 actions, but it has addressed the proper approach for state courts to take when entertaining federally-created actions. The decision of the Ohio Court of Appeals for the Second Appellate District, however, conflicts with decisions of this Court requiring state courts that entertain federally-created actions, including §1983 actions, to apply the entire federal cause of action with all its remedies.

In the present case, the Ohio lower court upheld the trial court's decision excising Petitioners' §1983 allegations from the pleadings. In essence, the Ohio trial court refused to accept Petitioners' federal claim. This procedural burden undermines and overrules the precedent of this Court, which bar the use of state policies that limit access to state courts by litigants with federal causes of action, and this Court has required state courts entertaining federal causes of action, including §1983 actions, to refrain from imposing state policies that burden the litigation of federal claims or conflict with the federal definition of the cause of action. *See e.g., Felder v. Casey,* 487 U.S. 131 (1988).

In *Felder v. Casey,* this Court admonished state courts that any state law that minimizes or bars governmental liability is inconsistent with the federal

civil rights law and principles mandate that such a state law must give way to vindication of federal right when that right is asserted in state court.

> "States, however, may no more condition the federal right to recover [under Section 1983] for violations of civil rights than bar that right altogether, particularly where those conditions grew out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of the federal right is concerned, *see Martinez*, 444 U.S. at 284. *Ibid.* at 141-2 (emphasis added).

Because of the trial court's initial fixation on the Ohio sovereign immunity provision for DBOE, it is unable to appreciate the principle of preemption.

Moreover, this Court has made it clear that violations of the constitution and laws of the United States are exclusively remedied under §1983. *See, Howlett by and through Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Zinermon v. Burch*, 110 S. Ct. 975 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Jett v. Dallas Independent School District*, 109 S. Ct. 2702 (1989). The Ohio lower Court failed to address Petitioners' constitutional questions that were raised in the trial court and ruled upon, in conflict with the decisions of this Court. If this decision is allowed to stand, it will be an impediment to Plaintiffs bringing §1983 actions in state courts.

Also, in *Brown v. Western Railway of Alabama*, 338 U.S. 249 (1949), this Court indicated its willingness to reject state practices that unnecessarily burdened rights arising under federal law. In *Brown*, a strict state pleading rule resulted in the dismissal of the plaintiff's FELA complaint. This Court granted certiorari "because

the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts." *Id.* at 295. Noting that "this federal right cannot be defeated by the forms of local practices," this Court reversed the dismissal. *Id.*

Although this Court has not addressed the precise issue of the obligation of state courts to entertain §1983 actions without regard to state procedures, it has required state courts to first define the scope of the §1983 action and to then apply all the policies that are part of the federally-defined cause of action.

In *Martinez v. California*, 444 U.S. 277 (1980), this Court refused to allow a state immunity statute to be used as a defense to a §1983 claim, even though the actions were being litigated in state court. In rejecting the application of the state-created immunity, this Court made clear that federal law is controlling.

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . The immunity claim raises a question of federal law.
>
> *Id.* at 284 n.8 (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

The present case also raises important issues as to the proper approach by state courts to §1983 actions. Many state courts are reluctant to abandon familiar state policies when entertaining §1983 actions. For example, in the present case, the trial court struck the

§1983 allegation *sua sponte* because the 1983 claim was pled with particularity and decided that there was no §1983 violation. However, the Court of Appeals tacitly admitted that there may have been a §1983 claim in this case, yet penalized Petitioners, claiming that the Second Amended Complaint did not contain a §1983 claim. This is a covert avoidance of federal claims by state court. Unless such relief is available in state court such federal state conflict remains, and state courts will penalize with impunity individuals who merely exercise their federal statutory rights. This conclusion follows directly from this Court's ruling in *Maine v. Thiboutot*, 448 U.S. 1 (1980) establishing that §1983 relief is available for federal statutory as well as constitutional violations. Because federal statutes are made binding upon state and local governments by the Supremacy Clause, every Section 1983 case involving a federal statutory claim necessarily involves some form of preemption under the Supremacy Clause. Thus, this case presents the opportunity for this Court to resolve the recurrent and troublesome question: the proper approach by state courts to §1983 actions. This Court has not dealt with this issue.

The initial questions that state and federal courts entertaining §1983 actions must address involve the scope of the §1983 cause of action. When federal courts define §1983 but find a gap or a deficiency in federal law, they are directed by the civil rights choice of law statute, 42 U.S.C. §1983, to look to state law for the appropriate policy.

When state courts entertain §1983 actions, however, there is an issue as to whether they may use their otherwise applicable state policies. Nonetheless, state courts must also go through the same process of defining

the scope of the §1983 cause of action. It is this threshold issue that state courts often overlook while rushing to decide whether state policies are inconsistent with the purposes of §1983 of burden §1983 litigation. Such questions, however, should only be asked after a state court has defined the scope of §1983 and required compliance with a state policy.

Because Karen has liberty interest to be free from sexual abuse, a substantive due process analysis by the lower Ohio court was necessary and appropriate to determine whether she is entitled to be protected by DBOE. *See Gross v. Lopez*, 419 U.S. 565, 573 (1975) (entitlement to public education under state law); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (recognizing entitlement to welfare under state law). Since Karen was entitled to be transported to OSSB. The fact that DBOE had subcontracted away the transportation of Karen does not relieve the DBOE of liability in light of *West v. Atkins*, 487 U.S. 42 (1988). The Board retains responsibility.

By failing to first define the scope of the federally-created §1983 cause of action, the Ohio lower court departed from the approach this Court has followed in construing federally-created actions, including actions authorized by §1983. We believe that this petition should be granted, to preserve Petitioners' statutory rights, to reaffirm this Court's ruling and to prevent the creation of new and unauthorized requirements for §1983.

CONCLUSION

Because the decision below directly conflicts with this Court's prior ruling, creates a new and unauthorized exception to Section 1983 relief and presents a recurrent and important federal question that should be resolved by this Court, a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

NWABUEZE V. OKOCHA
Counsel of Record
Okocha & Associates Co., L.P.A.
409 Investment Building
601 Rockwell Avenue
Cleveland, Ohio 44114-1602
(216) 574-9400
Counsel for Petitioners

Of Counsel:
ALVARENE N. OWENS
Alvarene N. Owens Co., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated March 27, 1991)

Case No. 91-31

THE SUPREME COURT OF OHIO

MARY JONES, *et al.*,
Appellants,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Alvarene N. Owens.

(Court of Appeals No. CA11933)

/s/ THOMAS J. MOYER
Chief Justice

OPINION OF THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

(Rendered October 3, 1990)

Case No. 11933

IN THE COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

MARY JONES, *et al.*,
Plaintiffs-Appellants,

vs.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants-Appellees.

OPINION

Oral argument heard on the 4th day of September, 1990.

Opinion rendered on the 3rd day of October, 1990.

HOWARD P. KRISHER
400 Gem Plaza, Third and Main Streets
Dayton, Ohio 45402-1908
Attorney for Defendant-Appellee
Dayton Board of Education

ALVARENE N. OWENS
1101 Salem Avenue
Dayton, Ohio 45406

NWABUEZE V. OKOCHA
650 Rockefeller Building
614 Superior Avenue
Cleveland, Ohio 44113
Attorneys for Plaintiffs-Appellants

GREGORY T. SCOTT
111 West First Street, Suite 523
Dayton, Ohio 45402
Attorney for Defendant-Appellee
Eddie Slaughter

ROBIN FREEMAN
ROBERT A. BURKE
P.O. Box 1488
Springfield, Ohio 45501-1488

JOHN PETZOLD
900 Talbott Tower
Dayton, Ohio 45402
Attorneys for Defendant-Appellee
Miami Liberty Cab Co.

[2] GRADY, *J.*

I

FACTS

This appeal arises from an action brought in the Common Pleas Court by Plaintiffs-Appellants Mary Jones, mother and guardian of Karen Jones, against Defendants-Appellants Dayton Board of Education, Miami Liberty Cab Company, and Eddie Slaughter. The Complaint was filed October 22, 1987. It alleged that on November 16, 1986, Karen Jones, a blind and multiple handicapped student of the Dayton Public School System, had been sexually assaulted by Eddie Slaughter, a taxi cab driver under contract to Miami Liberty Cab

Company, while he was transporting Karen Jones to the Ohio State School for the Blind in Columbus, Ohio, under and according to a contract agreement between Miami Liberty Cab Company and the Dayton Board of Education. The Complaint further alleged that as a result of the assault Karen Jones gave birth to a child. The Complaint demanded that Mary Jones, Karen Jones and the child, be compensated for expenses of a medical and psychological nature as well as for the cost of maintaining Karen Jones and her minor child, and for related expenses.

On December 22, 1988, Appellants moved to amend their Complaint to add additional claims for relief based upon a [3] violation of civil rights. On January 12, 1989, the court sustained that motion, and on January 13, 1989, the Amended Complaint containing those additional allegations and claims for relief were filed.

On January 13, 1989, Plaintiffs, with the prior leave of court, filed their first amended complaint, adding to their cause of action allegations and claims based on 42 U.S.C. Section 1983, Deprivation of Civil Rights Under Color of Law.

On January 25, 1989, Plaintiffs filed a motion to amend their first amended complaint to properly reflect the full names and identities of all parties plaintiff. On January 31, 1989, the court denied the motion to amend. On February 1, 1989, Appellants renewed their motion. By Decision and Entry filed February 3, 1989, the court reserved its decision on the motion, indicating to counsel for Appellants its approval was conditioned upon a reformation of the complaint to conform to the provisions of Civ. R. 8 concerning brevity and plainness. The court observed that: "The tendered second amended complaint is replete with superfluous and unnecessary

allegations, conclusions of law, and is generally so verbose as to be difficult to comprehend." The court indicated that it would review the tendered second amended complaint to determine if it conformed with the court's directions, and that failure to conform might result in denial of leave to amend.

[4] Appellants tendered their second amended complaint to the court. By Entry filed March 16, 1989, the court stated:

> "The Court has carefully reviewed this document and concludes that there has been little, if any, compliance with the Decison and Entry of this Court of February 3, 1989. While it certainly is not the province of the Court to draft pleadings for parties, be they plaintiff or defendant, in the interests of justice and judicial economy, the Court has carefully examined and excised that material in the tendered Second Amended Complaint which does not conform to the Civil Rules. A copy of this edited document is enclosed with this Decision and Entry.
>
> If counsel for Plaintiffs desires to pursue this litigation any further, they are instructed to prepare a Second Amended Complaint in accordance with the edited copy enclosed, provided it is tendered to the Court within 14 days after this Decision and Entry is served and journalized. If counsel declines to follow the instructions of the Court, the Court will consider the dismissal of this action for want of prosecution."

On February 10, 1989, Appellants tendered a Second Amended Complaint in compliance with the court's directions. The document contained numerous excisions in the form made by the court.

Motions for summary judgment were filed by Dayton Board of Education, Miami Liberty Cab Company, and Mary Jones. The court denied the motions

of Miami Liberty Cab Company and Mary Jones as not well taken on any of the issues raised. The court found in favor of the Dayton Board of Education upon the single issue argued in its motion; that [5] the action against the Dayton Board of Education is barred as a matter of law pursuant to R.C. 2744.02, the Political Subdivision Tort Liability Act. The court found that the Dayton Board of Education is a political subdivision and was engaged in performing a governmental function at the time of the act alleged; that is, it was providing a system of public education and is immune from liability because its actions did not fall with any of the exceptions provided in the statute.

The court's decision on all motions for summary judgment was entered November 8, 1989. The court found, pursuant to Civ. R. 54(B), no just reason for delay in resolving the determinations made. Mary Jones filed a notice of appeal from the judgments of the court on December 4, 1989. A second 54(B) order was filed December 4, 1989. A Notice of Appeal was thereafter filed by Miami Liberty Cab Company on January 2, 1990. The matter is now before the court upon assignments of error brought by Mary Jones and Miami Liberty Cab Company.

II

REFORMATION OF THE COMPLAINT

Plaintiff-Appellant Mary Jones alleges error on the part of the trial court in its orders of February 3, and March 16, 1989, allowing her to file a Second Amended Complaint only after certain matters were stricken from the proposed pleading.

[6] Civ. R. 15(A) provides that, after a responsive pleading has been served, a party plaintiff may amend his pleading only by leave of court or by written consent of the adverse party. The Rule provides that leave of court shall be freely given when justice so requires. This liberal amendment provision has been held to reflect two policies.

> First, a liberal amendment policy provides the maximum opportunity for each claim to be decided on the merits rather than on procedural deficiencies.
>
> Second, the Rule reflects the fact that the pleadings are assigned the limited role of providing the parties to a lawsuit with *notice* of the nature of the pleader's claim or defense. Discovery is available to paint a more detailed picture of the facts and issues. See, also, *Foman v. Davis* (1962), 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222.

Hoover v. Sumlin (1984), 12 Ohio St. 3d 1, 5, quoting Wright & Miller, Federal Practice and Procedure (1971), 359, Section 471.

Grant or denial of leave to amend a pleading is within the sound discretion of the trial court. Where the pleading is tendered timely and in good faith, and no reason is apparent or disclosed for denying leave, the denial of leave to file such an amended pleading or the subsequent striking of matter from an amended pleading is an abuse of discretion. *Hoover v. Sumlin, supra*, *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 297 N.E. 2d 113.

In making its orders the trial court observed that the [7] "amendments now sought to the Complaint should never have been required had the complaint been properly drafted in the first instant, and certainly not after a delay of sixteen months". (Decision and Entry, February 3, 1989). The court then went on to recite its

concern that the pleadings in the Second Amended Complaint were inconsistent with Civ. R. 8, finding the "tendered Second Amended Complaint is replete with superfluous and unnecessary allegations, conclusions of law, and is generally so verbose as to be difficult to comprehend". The court then gave the plaintiffs an opportunity to reform the Complaint to meet the court's concerns.

It appears from the record that Plaintiffs-Appellants failed to conform to the court's requirements. In the later Decision and Entry of March 16, 1989, the court edited the proffered Second Amended Complaint by striking from it a number of paragraphs and part-paragraphs. Plaintiffs-Appellants then filed that document in the form as edited.

The numerous changes made by the trial court through its editing process removed a number of superfluous matters from the pleadings. However, the court also removed entirely all allegations in support of Plaintiffs-Appellants' claim for relief brought pursuant to 42 U.S.C. Section 1983.

The parties are usually afforded great latitude in framing their allegations, claims for relief, and defenses. [8] Under modern pleading rules the primary intent of the pleading stage is to provide notice of the pleaders' claims or defenses. Factual determination, issue narrowing, and elimination of frivolous matters are now largely accomplished by discovery, pretrial conferences, and summary judgment. However, when the court is asked leave to amend a pleading already filed, the court has broader discretion to deny leave or control its use. The court may restrict the requested change on a finding that it would seriously impair the progress or course of the litigation. The court may thus deny leave to amend

pursuant to Civ. R. 15(A). It may also, on its own motion, "order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter". Civ. R. 12(F).

Though the trial court's action had a significant effect upon the case of Plaintiffs-Appellants, we conclude that the trial court did not abuse its discretion in striking certain pleadings. The court observed that the claim for relief could have been included in the original complaint filed sixteen months earlier. Further, it is clear that the Plaintiffs-Appellants wholly ignored the orders of the trial court to reform their pleadings to present them as a plain and direct statement of their claim for relief, as required by Civ. R. 8. Under those circumstances, and because the court clearly explained the [9] reasons for its action, we cannot find that the court's actions constitute an abuse of discretion under the rule of *Hoover v. Sumlin, supra.*

The assignment of error will be overruled.

III

SUMMARY JUDGMENT IN FAVOR OF DAYTON BOARD OF EDUCATION

In its Decision and Entry granting summary judgment to the Dayton Board of Education, the trial court found that the Dayton Board of Education is a political subdivision and was performing a governmental function at the time of the alleged incident, that is, providing a system of public education. The court also found that the Dayton Board of Education does not fall within any of the exceptions provided by R.C. Chp. 2744 because Eddie Slaughter was not an employee of the

Board, which exercised no control over him. The court concluded that by reason of the operation of R.C. 2744.02 the Dayton Board of Education was immunized from the common law tort claim brought by Plaintiffs and it granted summary judgment to the Board.

In *Mosley v. Dayton City School District* (July 6, 1989), Montgomery App. No. 11336, unreported, this court found that the Dayton City School District and School Board were political subdivisions as defined by R.C. Chp. 2744 and thus entitled to immunity under the provisions under that statute. The same facts and considerations apply in the case now before us. Thus, we find that the trial court did [10] not err in finding that Defendant-Appellee Dayton Board of Education was immunized under the provisions of that statute from the claims brought by Plaintiff-Appellant.

Plaintiffs-Appellants have set up a number of assignments of error claiming that the trial court erred in granting summary judgment to the Dayton Board of Education because R.C. Chp. 2744 has no application to a claim brought pursuant to federal law. In particular, they rely on their claims for relief brought pursuant to 42 U.S.C. Section 1983, though they also allege general federal constitutional provisions concerning right of privacy and equal protection.

We agree that state governmental immunity statutes do not apply to claims based on federal civil rights violations, particularly those brought pursuant to Section 1983 which require a showing of state action. *Felder v. Casey* (1988), 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed. 2d 123. *Martinez v. El Paso County* (1987 D. Colo.) 673 F. Supp. 1030. *Watson v. McGee* (1981 D.C. Ohio) 527 F. Supp. 234. However, those matters were not before the court at the time it granted summary

judgment. The only claims for relief before the court were in the original Complaint filed October 22, 1987, which were based entirely on common law tort theories and contained no claims for relief brought pursuant to federal law. Therefore, Plaintiffs-Appellants' arguments concerning the application of 42 U.S.C. Section 1983 and other provisions of federal constitutional and [11] statutory law in opposition to the summary judgment are not well made.

Plaintiffs-Appellants also allege liability on the part of the Dayton Board of Education in its failure to comply with the requirements of 84 Stat. 175, as amended, 20 U.S.C. Sections 1400 et seq. Those provisions, the Education of All Handicapped Children Act, require that the states identify all handicapped children and provide them with free appropriate public education, including special education and related services designed to meet their unique needs, and to assure that the rights of handicapped children and their parents or guardians are protected. In Ohio, the State's duties under the Act have been delegated to local boards of education pursuant to R.C. Chp. 3233. Those provisions have been construed to provide that "related services" includes the transportation necessary to assist a handicapped child to benefit from special education, including transportation outside the school district of his residence. 1978 Ohio Atty. Gen. Ops. No. 026.

Plaintiff-Appellant alleges that the Dayton Board of Education breached the duty it owed Karen Jones under the foregoing provisions by failing to provide her safe transportation. We do not agree. While there may be a basis for a federal claim in this concept, particularly as regards equal protection of the law, those matters have not been included in the Complaint on which the court

granted [12] summary judgment. The remaining bases in state law do not constitute a duty breached by the Board of Education by reason of the sexual assault performed by its contractor, Eddie Slaughter. The purposes of Ohio's Act are to meet the federal requirements concerning education of handicapped students and do not impose any special or particular duty concerning safety that was breached by Slaughter's crime. Furthermore, the facts presented to the court in support of and in opposition to the motions for summary judgment support the court's conclusion that the assault was simply not foreseeable to the Dayton Board of Education when it made its transportation arrangements with Miami Liberty Cab Company.

We conclude that the trial court did not err in finding that as to the Dayton Board of Education there was no question as to any material fact and that as a matter of law the Board was entitled to immunity under R.C. 2744.02. The various assignments of error brought by Plaintiffs-Appellants in respect to that matter will be overruled.

IV

SUMMARY JUDGMENTS DENIED

Cross-Appellants Eddie Slaughter and Miami Liberty Cab Company have each assigned the same error; that the trial court erred in finding that its denial of their respective motions for summary judgment were final, appealable orders as defined by R.C. 2505.02 and that as to those orders there [13] was no just reason for delay as provided by Civ. R. 54(B).

R.C. 2505.02 provides in pertinent part:

> An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial.

The denial of a motion for summary judgment does not determine an action and prevent a judgment, and thus generally does not constitute a final order under R.C. 2505.02, *State ex rel. Overmeyer v. Wallinsky* (1966), 8 Ohio St. 2d 23, *Celebrezze v. Netzley* (1990), 51 Ohio St. 3d 89. Further, the trial court's use of Civ. R. 54(B) language in its order does not turn an otherwise non-final order into a final appealable order. *Noble v. Colwell* (1989), 44 Ohio St. 3d 92.

The court's order denying the motions for summary judgments of the two Cross-Appellants was not made in a special proceeding. *General Accident Insurance Co. v. Insurance Company of North America* (1989), 44 Ohio St. 3d 17. *Amato v. General Motors Corporation* (1981), 67 Ohio St. 2d 253. The court's orders were made in "a straightforward civil action," *Noble v. Colwell, supra*, 44 Ohio St. 3d at 94, and no elements of that action constitute any form of "special proceeding" by virtue of any interest involved. [14] *Celebrezze v. Netzley, supra*, 51 Ohio St. 3d at 1294.

We find that the orders of the trial court denying their respective motions for summary judgment of Cross-Appellants Eddie Slaughter and Miami Liberty Cab Co. were not final appealable orders, and we sustain the assignments of error presented by each of those parties.

V

CONCLUSION

For the reasons stated in our opinion, the decision of the trial court granting summary judgment to the Dayton Board of Education is affirmed. The decisions of the trial court finding the denial of summary judgment requested by Eddie Slaughter and Miami Liberty Cab Company to be final, appealable orders are, to that extent, reversed and vacated. The matter is remanded to the trial court for further proceedings.

WILSON, *J.* and BROGAN, *J.*, concur

Copies mailed to:

Howard P. Krisher, Esq.
Alvarene N. Owens, Esq.
Nwabueze v. Okocha, Esq.
Gregory T. Scott, Esq.
Robin Freeman, Esq.
Robert A. Burke, Esq.
John Petzold, Esq.
Honorable Robert Brown

DECISION AND ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO RE PROTECTIVE ORDER AND MOTION TO QUASH

(Filed January 12, 1989)

Case No. 87-3339

(Judge Robert M. Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MARY JONES, etc.,
Plaintiff,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

DECISION AND ENTRY

(Sustaining Defendants' Motions (2) for Protective Order and Motion to Quash)

This cause is before the Court on the motion of the Defendant, Eddie Slaughter, through counsel, filed herein on January 10, 1989, seeking an order of this Court granting a protective order with respect to a deposition scheduled for January 13, 1989, and for an order quashing the subpoena duces tecum served upon that Defendant. The Court also has before it the motion of the Defendant, Dayton Board of Education, through

counsel, filed herein on January 10, 1989, seeking a protective order with respect to a deposition scheduled for January 19, 1989. Each of the motions is supported by a memorandum. Due to the imminency of the one deposition, the Court deems it appropriate and necessary to pass upon these motions without delay. The Court finds both motions well taken in their entirety.

Counsel for Plaintiffs have consistently acknowledged that the Defendant, Eddie Slaughter, is charged with a criminal offense arising out of the same facts giving rise to this litigation, and further that trial of that matter has not been completed. The Court could allow the deposition of Mr. Slaughter to proceed, but it is patent that Mr. Slaughter, on advice of counsel, will [2] decline to answer a substantial number of questions asserting his rights under the Fifth Amendment to the United Stated Constitution. For all the parties and all the lawyers involved in this matter to assemble for what would appear to be a vain endeavor would be a waste of everyone's time.

As to that same Defendant's motion to quash the subpoena duces tecum, counsel for Plaintiffs have apparently misconstrued the function of such a writ. That order to produce documents is so that the deponent may be questioned concerning those documents, and not to provide those documents to counsel prior to the deposition. If counsel for Plaintiffs want to examine documents prior to the deposition of Mr. Slaughter, counsel's attention is directed to Civil Rule 34.

With respect to the motion for protective order presented by the Dayton Board of Education, the Court is again aware of the tangential litigation with respect to what, if any, insurance carriers are required to provide a defense and/or indemnity. While this Court is not

presently aware of the schedule with relation to those determinations, it is apparent that those issues will not be resolved prior to January 19, 1989. For that reason, the Court finds the motion for protective order well taken. The sustaining of this motion, however, should not be construed as an indefinite stay of these proceedings. Inasmuch as this matter cannot proceed until Mr. Slaughter is deposed, and that cannot occur until after the disposition of the criminal proceeding, any efforts to depose the Dayton Board of Education should be delayed [3] until the termination of Mr. Slaughter's criminal proceeding. Meanwhile, counsel for the Defendants is directed to make the Court aware of the status of these separate proceedings so that the Court may be in an informed position with respect to any future endeavors to depose the Board of Education.

It is, therefore, ORDERED that the motions of the Defendant, Slaughter, filed herein on January 10, 1989, and the motion of the Defendant, Dayton Board of Education, filed herein on January 10, 1989, be, and the same are hereby SUSTAINED.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

/s/ ROBERT M. BROWN
Judge

DECISION AND ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO SUSTAINING MOTION TO AMEND COMPLAINT

(Filed January 12, 1989)

Case No. 87-3339

(Judge Robert M. Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MARY JONES, etc.,
Plaintiff,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

DECISION AND ENTRY

(Sustaining Motion to Amend Complaint)

This cause is before the Court on the motion of the Plaintiff through counsel, filed herein on December 22, 1988, seeking an order of this Court granting them leave to file a First Amended Complaint. A copy of the proposed First Amended Complaint is attached to the motion. The motion is supported by a memorandum. In response to this motion, the Defendants, Miami Liberty Cab Co. and Eddie Slaughter, through counsel, filed a memorandum in opposition. This motion is ready for

decision pursuant to the entry of this Court served and journalized on December 23, 1988. The Court finds the motion well taken.

Civil Rule 15(A) requires the Court to freely give leave to file an amended pleading so that all issues raised by the factual situation giving rise to litigation may be resolved. The Court notes that this action is set for trial on April 24, 1989, and therefore still leaves sufficient time for counsel for Defendants to meet the issues raised by an amended complaint.

The opposition raised to the filing of this amended complaint is primarily founded on the claims of statute of limitations [2] and real party in interest. While these may be very real issues, there are appropriate vehicles by which those issues may be raised. They are not, however, grounds for denying leave to amend the complaint.

It is, therefore, ORDERED that the motion of the Plaintiffs filed herein on December 22, 1988, be, and the same is hereby, SUSTAINED.

It is further ORDERED that the Clerk of Courts detach the amended complaint from the original motion and file-stamp the First Amended Complaint forthwith. Counsel for Defendant are urged to respond to the Amended Complaint as expeditiously as possible.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

/s/ ROBERT M. BROWN
Judge

DECISION AND PARTIAL SUMMARY JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO

(Filed November 8, 1989)

Case No. 87-3339

(Judge Robert M. Brown)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

MARY JONES, et al.,
Plaintiffs,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

DECISION AND PARTIAL SUMMARY JUDGMENT ENTRY

(Ruling on Summary Judgment Motions filed
August 15, 1989, September 8, 1989,
and September 15, 1989)

This Court presently has pending before it three summary judgment motions.

On August 15, 1989, the Defendant, Dayton Board of Education (hereinafter "DBOE"), through counsel, filed a motion for summary judgment. The motion is supported by a memorandum and exhibit. In response to this motion, Plaintiffs (hereinafter "Jones"), through counsel, filed a memorandum in opposition on September 22, 1989. Both parties rely upon affidavits.

On September 8, 1989, the Defendant Miami Liberty Cab Company (hereinafter "MLCC"), through counsel, filed a motion for summary judgment. The motion is supported by memorandum and an affidavit. In response to this motion, Jones, through counsel, filed a Memorandum in Opposition on September 22, 1989. Defendant Eddie Slaughter (hereinafter "Slaughter"), through counsel, also filed a Memorandum in Opposition to MLCC's motion on September 29, 1989. All parties rely upon affidavits and depositions.

On September 15, 1989, Jones, through counsel, filed an [2] amended motion for summary judgment. The motion is supported by memorandum, affidavits, and depositions. In response to this motion, DBOE, through counsel, filed a memorandum in opposition on September 29, 1989; MLCC, through counsel, filed a memorandum in opposition on October 2, 1989, and; Slaughter, through counsel, filed a memorandum in opposition on September 29, 1989. All parties rely upon numerous depositions and affidavits.

In reviewing all of the above motions for summary judgment, the Court has considered the motion and memoranda of counsel, the pleadings, the affidavits, and depositions.

The three motions are now ready for decision pursuant to the entry of this Court served and journalized on September 18, 1989. The Court finds DBOE's Motion for Summary Judgment well taken. The Court finds MLCC's Motion for Summary Judgment not well taken on any of the issues. Finally, the Court finds Jones' Motion for Summary Judgment not well taken on any of the issues.

The appropriateness of rendering a motion for summary judgment is determined by the tripartite demonstration: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion is adverse to the party against whom the motion for summary judgment is made . . ." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66.

As to DBOE's potential liability, it is necessary to examine the mandate of *R.C. Section 2744,* which covers tort liability for political subdivisions. It is uncontradicted that [3] DBOE is a political subdivision and thus, no genuine issue of material fact exists. *R.C. Section 2744.02* states that a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act of its own or its employees in performing a governmental or proprietary function.

Thus, since DBOE is a political subdivision and was performing a governmental function at the time of alleged incident—providing a system of public education *R.C. Section 2744.01(C)(2)(c)*—it is immune from liability if its actions did not fall within any of the exceptions listed in *R.C. 2744.02(B)(1)-(5).* DBOE does not fall within any of the exceptions because Slaughter was not an "employee" of DBOE. DBOE exercised no control over Slaughter, which is a key determination to be made in determining whether the relationship is employer-employee. *Marshall v. Aaron* (1984), 15 Ohio St. 3d 48, 49. Thus, since there is no question as to any material fact and as a matter of law DBOE is entitled to immunity under R.C. Section 2744.

MLCC raises two issues in its motion for summary judgment. First, that MLCC is not liable because it was unaware that Slaughter was unfit or incompetent. The Court is satisfied Jones has presented sufficient factual material to demonstrate that there is a genuine issue of material fact on this issue. Secondly, MLCC raises the issue that Slaughter was not an employee of MLCC and therefore, it assumes no liability for Slaughter's alleged negligence. The Court is satisfied that Slaughter has presented sufficient factual material to [4] demonstrate that a genuine issue of material exists as to the interpretation of the contract between Slaughter and MLCC regarding liability. Thus, MLCC's motion for summary judgment will not be granted on either issue.

A number of issues have been raised in Jones' Amended motion for summary judgment. First, Jones states that Slaughter sexually molested Karen Jones based on the doctrine of res judicata. Slaughter has presented sufficient factual to demonstrate that issues of material fact exist and that the doctrine of res judicata does not apply here. *Hever v. Huwe* (1924), 2 Oh. L. Abs. 475. Also, MLCC has presented sufficient factual material to demonstrate that there exists a question of fact as to liability.

Secondly, Jones raises the issue that DBOE failed to comply with *20 U.S.C. Section 1400.* By granting DBOE's Motion for Summary Judgment, it is dispositive of all issues against it. This also includes the following issues raised by Jones: violation of *42 U.S.C. Section 1983,* deprivation of 8th and 14th Amendment Rights, liberty interest—substantive due process deprivation, and DBOE's indifference and/or negligence towards Jones.

Next, Jones believes that the remaining defendants (Slaughter and MLCC) acted under color of state law, and thus she has a *42 U.S.C. Section 1983* claim. Essentially, Jones is arguing that Defendants breached a duty of care. However, *Doe "A" v. Special Sch. Dist. of St. Louis County,* 637 F. Supp. 1138, 1143 (E.D. Mo. 1986), states that, "[s]ection 1983 does not provide a remedy for violations of duties of care arising [5] out of tort law." Thus summary judgment will not be granted on this issue.

Summary Judgment must also be denied on the issue that the Defendants violated Karen Jones' 8th Amendment Rights. The 8th Amendment was designed to protect individuals convicted of crimes. *Ingraham v. Wright,* (1977) 430 U.S. 651, 664. Since Karen Jones has not been convicted of any crimes pertaining to this litigation this issue must be denied.

Jones also raises the issues that Defendants have violated her substantive due process rights and liberty interests of the 14th Amendment. The basis of these deprivations is again, duty of care. The Court is satisfied that Defendants have presented sufficient factual material to show that there is a genuine issue of material fact concerning any issue raising duty of care.

Finally, Jones raises the issue of right to privacy. However, none of the allegations raised in Jones' second amended complaint can be construed to raise this issue. *Fancher v. Fancher* (1982), 8 Ohio App. 3d 79.

It is therefore, ORDERED that the amended motion of Plaintiffs, Mary Jones, et al., for summary judgment filed herein on September 15, 1989, be, and the same is hereby OVERRULED.

It is further ORDERED that the motion of Defendant, MLCC, for summary judgment filed herein on September 8, 1989, be, and the same is hereby OVERRULED.

Finally, it is ORDERED that the motion of Defendant, DBOE, for summary judgment, filed herein on August 15, 1989, be, and [6] the same is hereby SUSTAINED.

It is ORDERED AND ADJUDGED that the Second Amended Complaint be, and the same is hereby, DISMISSED, as to the Defendant Dayton Board of Education, with prejudice. The Court determines that there is no just reason for delay in entering this judgment.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

ROBERT M. BROWN, *Judge*

ENTRY OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO

(Filed March 16, 1989)

Case No. 87-3339

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

MARY JONES, et al.,
Plaintiffs,

v.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

ENTRY

Pursuant to the Decision and Entry of this Court served and journalized on February 3, 1989, the Plaintiffs, through counsel, tendered a Second Amended Complaint to the Court on February 10, 1989. The Court has carefully reviewed this document and concludes that there has been little, if any, compliance with the Decision and Entry of this Court of February 3, 1989. While it certainly is not the province of the Court to draft pleadings for parties, be they plaintiff or defendant, in the interests of justice and of judicial economy, the Court has carefully examined and excised that material in the tendered Second Amended Complaint which does not conform to the Civil Rules. A copy of this edited document is enclosed with this Decision and Entry.

If counsel for Plaintiffs desires to pursue this litigation any further, they are instructed to prepare a Second Amended Complaint in accordance with the edited copy enclosed, provided it is tendered to the Court within 14 days after this Decision and Entry is served and journalized. If counsel declines to follow the instructions of the Court, the Court will consider the dismissal of this action for want of prosecution.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

APPROVED:

/s/ROBERT M. BROWN, *Judge*

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES, as Mother and Guardian on behalf of Karen Jones, a minor and an incompetent
336 Brookside Drive
Dayton, Ohio 45406

MARY JONES, as Next Friend and Guardian on behalf of Sally Jones, a minor
336 Brookside Drive
Dayton, Ohio 45406

and

MARY JONES
336 Brookside Drive
Dayton, Ohio 45406

Plaintiffs

vs.

DAYTON BOARD OF EDUCATION
348 W. First Street
Dayton, Ohio 45402

MIAMI LIBERTY CAB CO.
1406 Third National Building
Dayton, Ohio 45402

and

EDDIE SLAUGHTER
4821 Liberty Road
Dayton, Ohio 45418

Defendants

CASE NO. 87-3339
(Judge Brown)

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Now comes the Plaintiffs, Mary Jones, and Karen Jones and Sally Jones, minors, by and through their next friend, mother and guardian, Mary Jones, and for their Second Amended Complaint aver as follows:

Alvarine K. Owens Co. L.P.A.

1. Plaintiff Karen Jones is a minor, blind, emotionally disturbed, mentally retarded, handicapped and an incompetent individual, ~~pursuant to state and federal law~~, residing in Dayton, Ohio.

2. Plaintiff Sally Jones is a minor, and is the daughter of Plaintiff Karen Jones.

3. Plaintiff Mary Jones is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

4. Defendant Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), ~~and vested with the statutory duty pursuant to the provisions of Title 33 of Ohio Revised Code~~.

5. Defendant Miami-Liberty Cab Co. is at all times relevant hereto, a taxicab company and/or a common carrier, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

6. Defendant Eddie Slaughter is at all times relevant hereto, a resident of the City of Dayton, and employed as a cab driver by, or as an agent of Defendant Miami-Liberty Cab Co.

~~7. At all times relevant hereto, all of the Defendants acted under color of state law.~~

8. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff Karen Jones.

9. DPS evaluated and designed Plaintniff Karen Jones' educational plan and placed her in the Ohio State School for the Blind, ~~pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1400 et seq. and pursuant to state law~~.

10. ~~In compliance with the statutory duty~~, Defendant DBOE arranged and employed Defendant Miami-Liberty Cab Co. for the transportation of Plaintiff Karen Jones to the Ohio State School for the Blind by contract. A true and accurate copy of the contract is in the possession of Defendants DBOE and Miami-Liberty Cab Co.

~~11. Defendant DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.~~

~~12. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff Karen Jones to Defendant Miami Liberty Cab Co.~~

~~13. Over a period of several years, Defendant Miami Liberty Cab Co. transported Plaintiff Karen Jones from Dayton, Ohio, to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.~~

~~14. Defendant Miami Liberty Cab Co. received over five thousand ($5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.~~

15. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter ~~sexually molested and maliciously and unlawfully assaulted and~~

ALVARDO M. OWENS CO. L.P.A.

~~committed acts of gross sexual imposition upon Plaintiff Karen Jones by~~ unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

~~46. Defendant Slaughter's conduct was outrageous, malicious, reckless, wanton and oppressive.~~

17. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

~~48. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.~~

19. As a direct and proximate result of Defendant Slaughter's ~~unlawful~~ sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

20. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Plaintiff Sally Jones.

~~21. Defendant Slaughter is the natural and biological father of Plaintiff Sally Jones.~~

~~22. Defendants Miami Liberty Cab Co. and DOES were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.~~

~~23. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.~~

ALVAREZ, M. OWENS Co. L.P.A.

24. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Plaintiff Sally Jones' child care, necessities, medical, educational and recreational expenses, ~~until Plaintiff Sally Jones reaches majority~~.

~~25. The Defendants maliciously, recklessly, and wantonly interfered with and disrupted Plaintiff Karen Jones' education. This punishment is cruel and unusual, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.~~

26. As a direct and proximate result of Defendants' ~~reckless, wanton, willful, malicious and oppressive~~ acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

27. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

~~28. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.~~

~~29. Defendants DBOE and Miami Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also have a duty to protect and maintain a safe, violence free environment for the students under their custody and supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control~~

ALVAREZ N. OVIEDO Co. L.P.A.

~~the practices described in paragraphs 1 through 28 of this Second Amended Complaint.~~

~~30. Defendants DBOE and Miami Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.~~

~~31. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPC, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami Liberty Cab Co. Defendants DBOE and Miami Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.~~

~~32. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiffs.~~

~~33. The denial of adequate education to Plaintiff Karen Jones deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the EHA, causing Plaintiffs irreparable injury.~~

~~34. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under the Eighth and Fourteenth Amendments to the United States Constitution and the EHA, causing them irreparable injury.~~

ALVARENE R. OWENS CO. L.P.A.

~~95. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anxiety, indignity, terror, and other damages to be adduced at trial for which there is no adequate remedy under State law.~~

~~FIRST CLAIM~~

~~96. Plaintiffs reallege and incorporate by reference paragraphs 1 through 95 of the Second Amended Complaint as if fully rewritten herein.~~

~~97. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.~~

~~SECOND CLAIM~~

~~98. Plaintiffs reallege and incorporate by reference paragraphs 1 through 97 of the Second Amended Complaint as if fully rewritten herein.~~

~~99. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.~~

~~THIRD CLAIM~~

~~100. Plaintiffs reallege and incorporate by reference paragraphs 1 through 99 of the Second Amended Complaint as if fully rewritten herein.~~

~~101. Defendants DROC and Miami Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the~~

ALVAREZ M. OWENS Co. L.P.A.

patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

42. Plaintiffs reallege and incorporate by reference paragraphs 1 through 41 of the Second Amended Complaint as if fully rewritten herein.

43. The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

44. Plaintiffs reallege and incorporate by reference paragraphs 1 through 43 of the Second Amended Complaint as if fully rewritten herein.

45. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

46. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

ALVARADO M. OVIEDO CO. L.P.A.

~~SIXTH CLAIM~~

~~47. Plaintiffs reallege and incorporate by reference paragraphs 1 through 46 of the Second Amended Complaint as if fully rewritten herein.~~

~~48. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship.~~

~~SEVENTH CLAIM~~

~~49. Plaintiffs reallege and incorporate by reference paragraphs 1 through 48 of the Second Amended Complaint as if fully rewritten herein.~~

~~50. As a direct and proximate result of Defendants' actions, Plaintiff Kelly Jones, has suffered a loss of her mother, Karen Jones', society and companionship.~~

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award compensatory damages against Defendants joint and severally;

~~Award Plaintiffs compensatory damages against Defendants~~ in the amount of $1,520,000.00 ~~as per prayer for relief No. 1~~;

~~2.~~ Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 ~~as per prayer for relief No. 1~~, reasonable attorney fees and costs.

ALVARINO & OLIVER CO., L.P.A.

~~4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;~~

~~5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. section 1988 and the EHA as per prayer for relief No. 1;~~

✓. Demand for a jury trial pursuant to Civil Rule 38; and,

✓. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

ALVARENE M. OWENS
ALVARENE M. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

NWABUEZE V. OKOCHA
OKOCHA & ASSOCIATES CO.,L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs

Endorsement

PLAINTIFF'S FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Case No. 87-3339

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

MARY JONES,
Mother and Guardian
on behalf of
KAREN JONES, an incompetent,
2918 Jerome,
Dayton, Ohio 45408,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION,
JOHN LENEHAN,
Legal Counsel,
348 W. First Street,
Dayton, Ohio 45402,

MIAMI LIBERTY CAB CO.,
FRANK M. ROOT,
Statutory Agent,
1406 Third National Building,
Dayton, Ohio 45402

and

EDDIE SLAUGHTER,
4821 Liberty Road,
Dayton, Ohio 45418,
Defendants.

Now comes the Plaintiffs, Mary Jones and Karen Jones, a minor, by and through her next friend, mother and guardian, Mary Jones, and for her First Amended Complaint aver as follows:

1. Plaintiff, Karen Jones, is a handicapped individual pursuant to state and federal law, an incompetent and a minor residing in Dayton, Ohio.

2. Plaintiff, Mary Jones, is the mother, next friend and guardian of Plaintiff, Karen Jones, and a resident of Dayton, Ohio.

3. Defendant, Dayton Board of Education (hereinafter "DBOE") is a political subdivision of the State of Ohio and is charged with the government of the Dayton Public Schools (hereinafter "DPS"), pursuant to the provisions of Title 33 of Ohio Revised Code.

4. Defendant, Miami-Liberty Cab Co., is at all times relevant hereto, a taxicab company, engaged in the transportation of persons or property, and organized under the laws of the State of Ohio with its principal place of business located in the City of Dayton, County of Montgomery, State of Ohio.

5. Defendant, Eddie Slaughter, is at all times relevant hereto, a resident of the City of Dayton, and an employee or agent of Defendant, Miami-Liberty Cab Co.

6. At all times relevant hereto, all of the Defendants acted under color of state law.

7. At all times relevant hereto, all of the Defendants were aware of the peculiar susceptibility and vulnerability of Plaintiff, Karen Jones.

8. Defendant DBOE has a statutory duty to provide education to students within its jurisdiction, including but not limited to, providing transportation necessary for the education of students.

9. Plaintiff, Karen Jones, was identified by the DPS as an emotionally disturbed child by the time she entered the school system.

10. DPS also identified Plaintiff, Karen Jones, as a mentally retarded and blind.

11. Based on evaluations and tests administered by the DPS, Plaintiff, Karen Jones, was placed in an educational institution for the blind and for emotionally disturbed children consistent with the Defendant DBOE's statutory responsibility.

12. Plaintiff, Karen Jones, is entitled to instruction from the DPS pursuant to the Education of the Handicapped Act (hereinafter "EHA"), 20 U.S.C. Sections 1412(1), 1413(a), and pursuant to state law.

13. The EHA requires DPS to ensure a "free appropriate education" for all disabled children within its jurisdiction.

14. Defendant DBOE contracted the Ohio State School for the Blind, Columbus, Ohio for placement of Karen Jones.

15. DPS designed Plaintiff Karen Jones' educational plan.

16. Subsequently, Defendant DBOE entered into an agreement with the Ohio State School for the Blind consistent with its education plan for Plaintiff, Karen Jones.

17. Transportation is essential for the education of Plaintiff, Karen Jones, in the Ohio State School for the Blind.

18. In compliance with its statutory duty, Defendant DBOE arranged for the transportation of Plaintiff, Karen Jones, to the Ohio State School for the Blind, with Defendant, Miami-Liberty Cab Co.

19. Defendant DBOE employed Defendant Miami Liberty Cab Co. to transport its students, including but not limited to blind and retarded students, such as Plaintiff, Karen Jones, to schools.

20. At all times relevant hereto, Defendant Slaughter was acting as an employee or agent of the Defendant Miami Liberty Cab Co.

21. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiff, that it is a taxicab company or a common carrier, engaged in the business of transportation of persons or property for compensation.

22. Defendant DBOE authorized Defendant Miami-Liberty Cab Co. to transport Plaintiff, Karen Jones.

23. Defendant, DBOE bore an affirmative obligation to provide adequate transportation and for the safety of Plaintiff Karen Jones.

24. Defendant Miami-Liberty Cab Co. voluntarily assumed these obligations by contract.

25. As a result of the contract, Defendant DBOE delegated its function of transporting its students, such as Plaintiff, Karen Jones, to Defendant Miami-Liberty Cab Co.

26. Over a perod of several years, Defendant Miami-Liberty Cab Co. transported Plaintiff, Karen Jones, from Dayton, Ohio to the Ohio State School for the Blind, Columbus, Ohio, and vice versa.

27. Defendant Miami-Liberty Cab Co. received over five thousand (5,000.00) dollars per annum from Defendant DBOE as compensation for transportation of Defendant DBOE's students.

28. At all times relevant hereto, Defendant Miami-Liberty Cab Co. held out and/or represented to the public, including the Defendant DBOE and the Plaintiffs, that Defendant Slaughter was acting as its employee or agent.

29. Plaintiffs and Defendant DBOE reasonably believed that Defendant Slaughter was acting as an employee or agent of the Defendant Miami-Liberty Cab Co.

30. Defendant, DBOE and Plaintiffs relied on the aforestated representations to their own detriment.

31. On November 16, 1986, Plaintiff, Karen Jones, was transported in Defendant Miami-Liberty Cab Co.'s vehicles from Dayton, Ohio to Columbus, Ohio.

32. Defendant DBOE paid for the transportation of Plaintiff, Karen Jones, by Defendant Miami-Liberty Cab Co. to the Ohio State School for the Blind.

33. Defendants Miami-Liberty Cab Co. and DBOE were deliberately indifferent to the safety and care of Plaintiff Karen Jones by failing to protect her.

34. Defendants breached their special relationship with Plaintiff Karen Jones by failing to protect her.

35. On November 16, 1986, Plaintiff Karen Jones was transported in Defendant Miami-Liberty Cab Co.'s vehicle.

36. Defendant Slaughter was the driver of Defendant Miami-Liberty Cab Co.'s vehicle that transported Plaintiff Karen Jones.

37. On November 16, 1986, in the course of Defendant Miami-Liberty Cab Co.'s transporting Plaintiff Karen Jones from Dayton to Columbus in accordance with its contract with Defendant DBOE, Defendant Slaughter sexually molested and maliciously and unlawfully assaulted and committed acts of gross sexual imposition upon Plaintiff Karen Jones by unlawfully and violently engaging in sexual intercourse with Plaintiff Karen Jones.

38. Defendant Slaughter sexually molested and abused Plaintiff Karen Jones.

39. Defendant Slaughter's conduct was outrageous, malicious, wanton and oppressive.

40. Defendant Miami-Liberty Cab Co. knew or should have known about the dangerous propensities of Defendant Slaughter.

41. As a direct and proximate result of the sexual assault and abuse of Plaintiff Karen Jones, Plaintiffs have suffered and continue to suffer extreme pain, physical harm, shock, mental anguish, and emotional distress.

42. Contrary to the provisions R.C. Section 3313.20, Plaintiff Karen Jones states that she has received no benefits as a result of said sexual abuse and the ensuing treatment.

43. As a direct and proximate result of Defendant Slaughter's unlawful sexual intercourse, Plaintiff Karen Jones conceived and became pregnant.

44. On August 9, 1987, Plaintiff Karen Jones gave birth to a baby girl, Sally Jones.

45. Defendant Slaughter is the natural and biological father of Sally Jones.

46. As a direct and proximate result of Defendants' acts, Plaintiff Karen Jones has been severely and permanently injured in that she conceived and bore a child for which provision for care must be had and for which Plaintiff Karen Jones is incompetent and unable to provide for Sally Jones' child care, necessities, medical, educational and recreational expenses until Sally Jones reaches majority.

47. The Defendants maliciously and wantonly interfered and disrupted Plaintiff Karen Jones' education. This punishment is cruel, arbitrary, and in violation of state and federal law and the civil and constitutional rights of the Plaintiff Karen Jones.

48. As a direct and proximate result of Defendants' reckless, wanton, willful, malicious and oppressive acts, Plaintiffs have suffered great humiliation, shame, embarrassment and emotional distress.

49. Plaintiffs have suffered severe mental and emotional distress such that Plaintiff Karen Jones is afraid to attend school.

50. As a proximate result of Defendants' acts Plaintiffs have incurred medical expenses and will further incur such related medical expenses.

51. Defendant Miami-Liberty Cab Co. undertook to provide transporation for Plaintiff Karen Jones.

52. Defendant Miami-Liberty Cab Co. had a duty to exercise reasonable care for the safety of Plaintiff Karen Jones.

53. Defendant Miami-Liberty Cab Co. breached its duty of care to Plaintiff Karen Jones by hiring or retaining unqualified or irresponsible employees and personnel; by failing to establish or to enforce policies

and procedures necessary to insure the safety of Plaintiff Karen Jones by failing to monitor the quality of care being provided to its passengers.

54. As a direct and proximate result of Defendant Miami-Liberty Cab Co.'s breach of its duty of care, Plaintiffs were injured.

55. Defendant DBOE undertook to provide transportation for Plaintiff Karen Jones.

56. Defendant DBOE had a duty to exercise due skill and care in selecting, hiring, firing and retaining responsible employees and services, but failed to establish or to enforce policies and procedures necessary to insure the safety of Plaintiff Karen Jones and failed to monitor the quality of care being provided to its students.

57. Defendant DBOE breached this duty of care by failing to select a responsible company and in failing to insure the safety and protection of Plaintiff Karen Jones.

58. As a direct and proximate result of Defendant DBOE's breach of its duty of care, Plaintiffs were injured.

59. Defendants DBOE and Miami-Liberty Cab Co. are responsible for selecting, hiring, firing, instructing, training, supervising and controlling all their employees, and for setting all of their policies for such. They also have a duty to protect and maintain a safe, violent-free environment for the students under their custody and supervision. They have knowingly failed to exercise their responsibilities in such a way so as to avoid and control the practices described in paragraphs 1 through 8 of this First Amended Complaint.

60. Defendants DBOE and Miami-Liberty Cab Co. have knowledge of the denial of education, humiliation, degradation, sexual abuse, excessive physical force and inhumane treatment of its students. They have not taken steps to correct these practices, but have acquiesced in or condoned them.

61. The injuries and threatened future injuries to Plaintiffs, and to the other children in the DPS, are proximately caused by the actions and nonfeasance of Defendants DBOE and Miami-Liberty Cab Co. Defendants DBOE and Miami-Liberty Cab Co. have acted deliberately and with gross and reckless negligence, and have displayed deliberate indifference to the needs of Plaintiffs.

62. Defendants follow and have followed at all times relevant hereto, a pattern or practice of inflicting arbitrary and capricious acts on Plaintiff.

63. The denial of adequate education to Plaintiff Karen Jones, deprives her of her rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing Plaintiff's irreparable injury.

64. The infliction of arbitrary, inhumane treatment and sexual molestation and abuse of Plaintiff Karen Jones and the interference and disruption of her education and family life constitutes cruel and unusual punishment and deprives Plaintiffs of their rights under the Eighth and Fourteenth Amendments to the United States Constitution, causing them irreparable injury pursuant to 42 U.S.C. Section 1983.

65. As a direct and proximate result of Defendants' actions, Plaintiff have suffered physical harm, stigmatization, mental and emotional distress, humiliation, grief, anziety, indignity, terror, and other damages to be adduced at trial.

FIRST CLAIM

66. Plaintiffs reallege and incorporate by reference paragraphs 1 through 65 of the First Amended Complaint as if fully rewritten herein.

67. Defendants maintained a course of conduct and practice that violated Plaintiffs' civil and constitutional rights, proximately causing them injury, pursuant to 42 U.S.C. Section 1983.

SECOND CLAIM

68. Plaintiffs reallege and incorporate by reference paragraphs 1 through 67 of the First Amended Complaint as if fully rewritten herein.

69. Defendant Slaughter tortiously assaulted Plaintiff Karen Jones, proximately causing her injury.

THIRD CLAIM

70. Plaintiffs reallege and incorporate by reference paragraphs 1 through 69 of the First Amended Complaint as if fully rewritten herein.

71. Defendants DBOE and Miami-Liberty Cab Co., by failing to establish and enforce rules of conduct for their employees, by acquiescing in and condoning the patterns and practices of their employees, by failing to protect Plaintiff Karen Jones and to insure her safety, and by failing to exercise in a proper manner their power to select, hire, fire, train, supervise and control their employees, have through gross negligence breached a duty owed to Plaintiffs, proximately causing them injury.

FOURTH CLAIM

72. Plaintiffs reallege and incorporate by reference paragraphs 1 through 71 of the First Amended Complaint as if fully rewritten herein.

73. The Defendants' actions were wanton and willful and constitute invasion of privacy.

FIFTH CLAIM

74. Plaintiffs reallege and incorporate by reference paragraphs 1 through 73 of the First Amended Complaint as if fully rewritten herein.

75. Defendants' actions were intentionally and maliciously designed and executed so as to cause Plaintiffs to suffer severe emotional and mental distress.

76. Plaintiffs have suffered and will continue to suffer extreme hardship, severe mental and emotional distress, anguish, anxiety, humiliation, embarrassment and actual impending irreparable damage in that they will be further harassed, coerced, intimidated and stigmatized, as well as deprived of their right to education.

SIXTH CLAIM

77. Plaintiffs reallege and incorporate by reference paragraphs 1 through 76 of the First Amended Complaint as if fully rewritten herein.

78. As a direct and proximate result of Defendants' actions, Plaintiff Mary Jones has suffered a loss of her daughter's society and companionship.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this honorable Court grant the following relief:

1. Award damages against Defendants joint and severally;

2. Award Plaintiffs compensatory damages against Defendants in the amount of $1,520,000.00 as per prayer for relief No. 1;

3. Award Plaintiffs punitive damages against Defendants in the amount of $1,500,000.00 as per prayer for relief No. 1;

4. Enter preliminary and permanent injunctions against Defendants, their agents, employees and assigns to: (a) Exercise their duties to select, hire, fire, train, supervise and control Dayton Public Schools' policy so as to eliminate sexual molestation and abuse and the interference and disruption of children's education, such as Plaintiff Karen Jones; (b) Provide adequate education for children; and (c) Provide safe transportation of children without violence;

5. Award Plaintiffs their costs and expenses of this action, including reasonable attorney's fees pursuant to 42 U.S.C. Section 1988 as per prayer for relief No. 1;

6. Demand for a jury trial pursuant to Civil Rule 38; and,

7. Award any other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ ALVARENE N. OWENS
ALVARENE M. OWENS CO., L.P.A.
1101 Salem Avenue
Dayton, Ohio 45406
(513) 275-6842

/s/ NWABUZZE V. OKOCHA
OKOCHA & ASSOCIATES CO., L.P.A.
650 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, Ohio 44113
(216) 574-9400

Attorneys for Plaintiffs